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In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE IMMIGRATION CLINIC AT THE UNIVERSITY OF HOUSTON LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Immigration Clinic at the University of Houston Law Center (the "Clinic") submits this *amicus curiae* brief in support of Antonio Rodriguez-Zapata's petition for writ of certiorari.[1] Petitioner seeks review of the United States Court of Appeals for the Fifth Circuit's decision that an immigration judge ("IJ") and the Board of Immigration Appeals ("BIA") were statutorily required to deny his request for discretionary relief from removal from the United States without a hearing (a "§212(c) hearing"). The court also concluded that denying a §212(c) hearing did not violate Petitioner's due process rights. The Clinic shares Petitioner's position that the Fifth Circuit's view of the constitutional rights of Lawful Permanent Residents ("LPRs") of the United States is incorrect, and that it was unconstitutional to apply the 1996 repeal of §212(c) of the Immigration and Naturalization Act ("INA") retroactively to Petitioner.

The Clinic and the immigrants it represents have a significant interest in the issues the Petitioner asks the Court to address. The Clinic has been part of the University of Houston Law Center's clinical program since 1999. The lawyers who staff the Clinic handle applications for asylum on behalf of victims of torture and persecution, and represent immigrants who have been the victims of domestic violence. The Clinic represents clients in a variety of immigration proceedings, including: representation in removal proceedings; asylum applications; family visa processing; citizenship; juvenile matters; relief under the Violence Against Women Act; and review of Department of

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[1]This brief is submitted with the consent of the parties pursuant to U.S. Supreme Court Rule 37(2). Pursuant to Rule 37.6, the Clinic affirms no party or their counsel authored or paid for this brief, in whole or in part.

Homeland Security ("DHS") decisions and the Executive Office for Immigration Review, including §212(c) hearings.

Joseph A. Vail, Associate Clinical Professor, was an immigration judge from 1995 to 1999. He practiced throughout the 1980s and 1990s, when §212(c) was a common defense to exclusion and deportation charges, and he handled many §212(c) cases on behalf of resident aliens. The Clinic's other lawyers devote a substantial portion of their time to assisting immigrants held by Immigration and Customs Enforcement ("ICE") pending removal. Section 212(c) is often a viable remedy for these immigrants.

The Clinic advocates for application of the immigration laws in a manner that is fair, uniform, and mindful of immigrants' rights, including in particular, the constitutional rights of Lawful Permanent Residents of the United States.

BACKGROUND

A. The Statutory Changes To The Immigration Laws

Prior to 1996, INA §212(c) (8 U.S.C. §1182(c) (1994)) provided a critically important defense to deportation for LPRs facing removal from the country.[2] Though often resulting from a crime or conviction, any statutorily-defined ground for inadmissibility could trigger removal proceedings. Under §212(c), a LPR convicted of a crime could ask the Attorney General to waive deportability if: (a) the LPR had served less than five years in prison for that crime (applicable for aggravated felons only); and (b) the LPR had maintained "an unrelinquished domicile of seven consecutive years" in the United States. 8 U.S.C. §1182(c)

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[2] The terms "deportation" and "removal" are used interchangeably in this *amicus* brief.

(1994). Additionally, a LPR could *affirmatively* apply for §212(c) relief – an important consideration for (among others) a LPR intending to travel outside the United States.

The Attorney General delegated his role in this regard to IJs (for pending proceedings) and District Directors (for non-pending proceedings), with BIA review. *Jay v. Boyd*, 351 U.S. 345, 352 n.8 (1956). Section 212(c) hearings allowed an IJ or District Director to decide, on the individualized facts, whether social and humane considerations outweighed the alien's undesirability as a permanent resident.

Since at least 1978, the BIA has had standards by which it (and an IJ in the first instance) evaluates requests for §212(c) relief. The IJ must consider negative and positive factors: (1) the seriousness of the offense; (2) immigration and criminal histories; (3) the presence of "other evidence" indicating the LPR's bad character or undesirability; (4) any evidence of rehabilitation (or recidivism); (5) how long the LPR has resided in the U.S.; (6) the LPR's family ties in the U.S.; (7) the extent of the hardship to the LPR and his family that would result from deportation; (8) the LPR's employment history; and (9) the character of any service in the Armed Forces. *In re Marin,* 16 I. & N. Dec. 581, 584-85 (BIA 1978). As a crime's seriousness increases, the equities must be outstanding; if the equities are outstanding, then rehabilitation usually becomes a crucial factor in the final balancing of the positive and negative factors. *In re Edwards*, 20 I. & N. Dec. 191, 196 (BIA 1990).

"[T]he class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for §212(c) relief have been granted." *I.N.S. v. St. Cyr*, 533 U.S. 289, 295 (2001) (noting more than 10,000 aliens were granted §212(c) relief between 1989 and 1995). Indeed, IJs *regularly* granted §212(c) relief.

Between 1989 and 1995, more than one-half of all §212(c) petitions were granted. *Id.* at 296 n.5; 142 CONG. REC. S12,294-01, S12,295 (daily ed. Oct. 3, 1996) (Statement of Sen. Abraham). In the Clinic's experience, an IJ usually granted §212(c) relief when a LPR defending removal based on a crime showed outstanding equities, rehabilitation, and remorse. This is especially so when the resident had long periods of time without subsequent offenses.

The passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), (collectively, the "1996 Amendments") sharply curtailed the population of LPRs convicted of a crime who potentially could avoid removal. Specifically, in §440(d) of the AEDPA (effective April 24, 1996), Congress amended 8 U.S.C. §1182(c) to bar §212(c) relief for (among others) any LPR who had been convicted of an "aggravated felony" in the United States – regardless of whether the LPR had been sentenced to or had served any time in prison for that offense. Pub. L. 104-132, 110 Stat. 1214, 1277 (1996). Congress then passed IIRIRA, §304(b) of which repealed §212(c) altogether and replaced it with a procedure called "cancellation of removal." Pub. L. No. 104-208, 110 Stat. 3009-587 (1996). IIRIRA took effect on April 1, 1997. Cancellation of removal also is not available to any LPR convicted of an aggravated felony while in the United States.

Moreover, over the last two decades, Congress also has expanded markedly the types of crimes considered "aggravated felonies" for purposes of INA §212(c) and IIRIRA §304(b). "Aggravated felony" first appeared in the immigration law context in the Anti-Drug Abuse Act of 1988, which simply created a separate ground for deportation for serious crimes like murder, any drug trafficking crime, or any illicit trafficking in any firearms or destructive devices. Pub. L. 100-690, 102 Stat. 4181 (1988). In 1990, Congress

passed the Immigration Act, which limited discretionary relief for §212(c) waivers, suspensions of deportation, voluntary departures, asylum, and withholding of deportation for aliens who had been convicted of an "aggravated felony." Pub. L. 101-649, 104 Stat. 4978 (1990). The Immigration Act also expanded "aggravated felony" to include money laundering and "*any crime of violence* . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." *Id.* (emph. added). In 1994, Congress again expanded the definition to include non-violent crimes such as fraud, burglary, and theft. Immigration and Nationality Technical Correction Act of 1994, Pub. L. No. 103-416, 105 Stat. 1733 (1994).

In 1996, Congress dramatically expanded "aggravated felony" to include dozens more offenses, including misdemeanor and low-level felony offenses. 8 U.S.C. §1101(a). Concurrently, Congress lowered the imprisonment threshold for many crimes from five years to one. *E.g.*, 8 U.C.S. §1101(a)(43). Moreover, Congress made clear the new, broader statutory definition of "aggravated felony" applies retroactively. *Aragon-Ayon v. I.N.S.*, 206 F.3d 847 (9th Cir. 2000); *see also Garrido-Morato v. Gonzales*, No. 05-60555, 2007 U.S. App. LEXIS 9372 (5th Cir. Apr. 24, 2007).

B. These Statutory Changes Trap Petitioner

Petitioner was admitted as a LPR on or about May 5, 1981. He since has established deep family ties in the United States, where he has a wife and four children (three of whom were born in the United States). Petitioner's father and four siblings all live in the United States as well.

Fourteen years after he was admitted, in October 1995, a jury convicted Petitioner of indecency with a child, in violation of the Texas Penal Code. The Penal Code provided

for up to twenty years in prison. But, on the jury's recommendation, the court sentenced Petitioner to only ten years probation (no jail time) and fined him $2,000.

Petitioner's conviction rendered him removable. However, he also would have been eligible for §212(c) relief. Indeed, in the Clinic's experience, Petitioner would have readily qualified for §212(c) relief because he has not been convicted of any subsequent offense, he has strong family ties, and he has a long residence in the United States. However, because the Attorney General did not promptly seek to remove Petitioner, he had no reason to petition for such relief at any time before the 1996 statutory changes.

Nearly six years later, on June 27, 2001, the Immigration and Naturalization Service ("INS") issued a Notice to Appear to Petitioner, citing his 1995 conviction as an "aggravated felony" that rendered him removable. Petitioner conceded removability and requested §212(c) relief. The IJ concluded that, in view of the 1996 repeal of §212(c), he had "no option" but to deny Petitioner's request for relief. The BIA affirmed without opinion; and the Fifth Circuit affirmed in an unpublished opinion, citing its holdings in *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 40 (2006), and *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002), as controlling authority.

SUMMARY OF ARGUMENT

The Fifth Circuit's selectively retroactive elimination of §212(c) hearings for certain LPRs violates the constitutional guarantee of due process. It, of course, "does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." Rather, the retroactive aspects of legislation must satisfy due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). Eliminating §212(c) hearings

for LPRs convicted of crimes prior to the 1996 Amendments' effective dates does not satisfy due process.

The Fifth Circuit also is improperly discriminating in an arbitrary and capricious manner among LPRs convicted by a jury and those convicted because of a plea bargain. The court's approach materially penalizes—retroactively and without prior notice—LPRs who exercised their constitutional right to a jury trial.

Although this Court has denied other petitions for writ of certiorari that raised these or similar issues, as Petitioner correctly points out [Petition at 3], this case does not suffer from the procedural infirmities affecting those other petitions. To the contrary, the facts here squarely present the legal issues that divide the federal courts of appeals after *St. Cyr*: whether and to what extent the elimination of §212(c) hearings can constitutionally be retroactively applied. This Court should grant the Petition.

ARGUMENT

A. This Was A Retroactive Application Of A Statute

The Fifth Circuit held, first, that applying the 1996 Amendments to Petitioner "did not create an impermissible retroactive effect." That holding was incorrect. A statute is retroactive where (as here) it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994).

Applying the 1996 Amendments to Petitioner attached a "new disability" – automatic removal from the country – to past transactions and considerations, including: (1) his decision not to appeal a conviction resulting in a lenient

sentence; and (2) if he had been offered a plea bargain (the record does not reflect one way or the other), his decision to decline it and chance that a jury either would find him not guilty or recommend a sentence more lenient than what the prosecutor had offered. In short, the Fifth Circuit plainly applied the 1996 Amendments retroactively.

B. Where, As Here, Congress Does Not Mandate That A Statutory Provision Applies Retroactively, Courts Must Presume That It Applies Only To Post-Enactment Conduct

The principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *St. Cyr*, 533 U.S. at 316 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Because retroactive statutes "raise special concerns" (*id.* at 315), a statute usually may not be applied retroactively absent a clear indication Congress intended that result. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 316 (quoting *Landgraf*, 511 U.S. at 272-73).

Although Congress *did* expressly state that certain of the 1996 Amendments apply retroactively, Congress *did not* state that the 1996 amendment and subsequent repeal of INA §212(c) should apply retroactively. *Id.* at 320. Absent such a congressional directive, courts must presume the statutory elimination of §212(c) hearings operates prospectively only.

However, the Fifth Circuit (and the other courts of appeal differentiating between LPRs convicted as the result of a plea bargain and those convicted by a jury) actually employ the opposite presumption: they presume that the 1996 repeal

of §212(c) applies retroactively to eliminate §212(c) relief as a matter of law *unless* a LPR demonstrates otherwise. These courts, by requiring a LPR to prove he subjectively relied on the existence of §212(c) relief (in, for example, formulating his criminal defense strategy), reverse the required presumption and improperly convert a question of law (a statute's retroactivity) into a highly fact-specific inquiry.

C. It Violates Due Process To Apply The Repeal Of §212(c) Retroactively To A LPR Convicted Of A Crime Before The 1996 Amendments

In the *Landgraf* line of cases, this Court established a framework for evaluating when and whether private actions are protected from retroactive laws. Where (as here), Congress has not spoken, this Court considers: (1) the nature of the change in the law; (2) the extent of the change in the law; and (3) the degree of connection between the operation of the new rule and a relevant past event. Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1140 (Spring 2000). Here, the law has changed drastically in kind and scope, and the change has materially affected certain LPRs' past conduct and decisions, in that it eliminates their statutory right to seek relief from removal in an individualized setting, to which due process rights attach.

1. The Nature And Extent Of The Changes The 1996 Amendments Made To Immigration Law Were Profound, As They Eliminated The Only Available Avenue For Avoiding Removal From This Country

This Court has repeatedly stated that the greater the punitive effect of a change in law, the more skeptical it will be of arguments urging the retrospective application of the changed law. Here, although the outcome mandated by the 1996 Amendments (removal from the country) technically is

not "punitive," it "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Over thirty years ago, this Court noted it would "hesitate to approve the retrospective imposition of liability on *any* theory of deterrence . . . or blameworthiness." *Usery*, 428 U.S. at 7 (emph. added).

Then, in *Landgraf*, 511 U.S. at 281, this Court applied *Usery*'s teachings. *Landgraf* held a then-new provision of Title VII authorizing punitive damages in a civil suit if the plaintiff established the defendant acted with malice or reckless indifference could not be applied retroactively. Although punitive damages (like forced removal) are not technically "criminal sanctions," they do "share key characteristics." *Id.* Moreover, the new Title VII provision authorizing plaintiffs to recover *compensatory* damages (whereas before, they were limited to a backpay remedy) *also* was the type of provision that, though not punitive, nonetheless "would attach an important new legal burden" on defendants' past conduct, and therefore also could not constitutionally be applied retroactively. *Id.* at 282-83. Critically, this Court noted (at 283-84):

> The extent of a party's liability, in the civil context, as well as the criminal, is an important legal consequence that cannot be ignored. . . . [We have never] read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment.

More recently, this Court also held it unconstitutional to apply economic legislation in a way that imposes substantial and disproportionate burdens on past conduct. *Eastern*

Enterprises v. Apfel, 524 U.S. 498 (1998). This Court's recent punitive damages jurisprudence reflects similar concerns about retrospectively imposing burdens on past conduct. Specifically, that disproportionate punitive damages awards violate due process reflects the Court's recognition (seen in *Usery*, *Landgraf* and *Eastern Enterprises*) that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Petitioner's interest in having an opportunity to establish that social and humane factors outweigh his undesirability as a U.S. resident is at least as weighty as the economic burdens in *Landgraf*, *Usery*, *Eastern Enterprises*, and *BMW*. The very same "elementary notions of fairness enshrined in our constitutional jurisprudence" this Court cited in those cases to bar retroactive application of laws that increased liability for past conduct also apply in the immigration context. A deportation hearing "involves issues basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). "Here the liberty of an individual is at stake." *Bridges*, 326 U.S. at 154. "[I]t must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling [and] may result in the loss 'of all that makes life worth living.'" *Id.* at 147 (citations omitted).

2. The Retroactive Reach Of The Elimination Of §212(c) Hearings Is Temporally Unbounded

The far-reaching effect of the 1996 repeal of §212(c) also counsels in favor of only applying that statutory change

prospectively. Where a statute's retroactive effect is "confined to a short and limited period," (e.g., "a time period required by the practicalities of producing national legislation"), that limited degree of retroactivity will not necessarily render it unconstitutional. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Conversely, however, where a statute's retroactive effect would be temporally boundless, that fact compels its prospective application.

Here, eliminating §212(c) hearings reaches back to affect even those LPRs who committed a single indiscretion years ago. Under the Fifth Circuit's approach, hundreds of LPRs (like Petitioner) who have spent years as law-abiding, gainfully-employed U.S. residents are unfairly subject to the uncertainty of the long arm of the law reaching out to pluck them from what perhaps may be the only life they know.

3. The Fifth Circuit's Elimination Of A Right To A §212(c) Hearing Unconstitutionally Deprives Petitioner Of Liberty And Property Interests

Applying the 1996 Amendments retroactively to deprive Petitioner of a right even to *seek* §212(c) relief deprives him of liberty and property interests. Although a LPR does not possess the full panoply of rights as a U.S. citizen, a LPR *does* possess the rights to liberty and property. *Landon v. Plasencia*, 459 U.S. 21 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (the Fifth and Fourteenth Amendments protect aliens within the jurisdiction of the United States from deprivation of life, liberty or property without due process of law). And where, as here, protected liberty or property interests are implicated, "the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Perry v. Swindermann*, 408 U.S. 593, 603 (1972) (an applicant for continued employment "must be

given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution'").

By depriving Petitioner (and others in his situation) of the right to a hearing where he could demonstrate that social and humane considerations outweigh his "undesirability" as a U.S. resident, the Fifth Circuit improperly fails to recognize LPRs' constitutional liberty and property rights.

a. LPRs Have Liberty And Property Interests In The "Right To Try" To Avoid Removal

Petitioner has a legitimate claim of entitlement to a §212(c) hearing at which he might try to establish his eligibility for relief. He is not required, as a matter of constitutional law, to establish that he would received 212(c) relief if granted a 212(c) hearing. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). For example, although the welfare recipients in *Goldberg* had not yet shown they were "within the statutory terms of eligibility," this Court nonetheless held "they had a right to a hearing at which they might attempt to" make such a showing. *Roth*, 408 U.S. at 577.

To have a property interest in a benefit, an individual must have a "legitimate claim of entitlement" to that benefit. *Id.* The federal courts of appeal agree that individuals have liberty or property interests in the right to apply for a benefit if specific eligibility criteria limit the decisionmaker's discretion to grant or deny the benefit. For example, in *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980), the court found comprehensive regulations governing a prison work-release program created an entitlement to which liberty rights attach. There, a prisoner sued for violation of his due process rights, claiming prison authorities denied his work-release applications on grounds not set forth in the

regulations. *Id.* at 1000-01. The statute and regulations envisioned the grant of work release when a prisoner met "certain eligibility criteria and the prison authorities, exercising their sound discretion, concur that work release is appropriate." *Id.* at 1006. Significantly, that the prison authorities had a measure of discretion in administering the work release program did not "negate the possibility that a state-created entitlement to work release may exist," primarily because their discretion was *not* absolute. *Id.* To the contrary, the regulations conferred discretion on prison officials to deny an application for work release "only within established parameters." *Id.* at 1007. In other words, although the authorities had discretion, "that discretion must be exercised consistently with the purpose and policy behind work release." *Id.* Other cases are in accord:

- *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) ("Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum" where the statute and federal regulations governing asylum law signal "a clear intent to grant aliens the *right to submit* and the *opportunity* to substantiate their claim for asylum") (emph. added);

- *Mallette v. Arlington County Employees' Supplemental Retirement System II*, 91 F.3d 630, 635 (4th Cir. 1996) (a county retirement-benefits ordinance that narrowed the substantive range of decisionmaking to the application of certain particularized eligibility criteria with language stating "qualifying members 'shall receive' benefits" created "a legitimate claim of entitlement");

- *National Ass'n of Radiation Survivors v. Derwinsky*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) (applications for service-connected death and disability compensation benefits based on exposure to nuclear radiation from atomic bomb tests, which involved a process

designed to function "with a high degree of informality and solicitude for the claimant" and that was governed by "general regulations," conferred a constitutionally-protected property interest in those benefits);

- *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (Congress and the executive branch granted aliens a constitutionally-protected right to apply for temporary residency under the Special Agricultural Worker program, as well as a right to substantiate their claims for eligibility, because Congress restricted decisionmakers' discretion to grant or deny benefits);

- *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982) (applicants have a property interest in applications for federal rent subsidies because the controlling regulations and guidelines "closely circumscribe an owner's discretion" in the Section 8 application and selection process);

- *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) (applicants who meet "the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause," including applicants for parole, bar admission, general assistance, federal employment, social security, chauffeur's license, Aid to Families with Dependent Children, public housing, and worker's compensation);

- *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132 (8th Cir. 1984) (rejecting the distinction between eligibility and termination of a benefit and instead finding "[t]he proper inquiry is whether plaintiffs have a legitimate claim of entitlement to relief assistance"; further holding that specified procedures for general relief assistance "are necessary to reduce the risk of arbitrary decisionmaking in the administration of the general relief program"); and

• *Griffeth v. Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) (an authorizing statute and implementing regulations created a legitimate entitlement claim and expectancy of general relief benefits).

This Court has never squarely addressed whether an individual has a property interest in a claim to or application for benefits. *See, e.g., Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (mem.) (order denying certiorari) (O'Connor, J., dissenting); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985).

However, this Court did recognize more than fifty years ago (and in the immigration context) that retroactively changing the process for granting relief from deportation *from* a regime involving bridled discretion *to* a regime of predetermined results violates the Due Process Clause. *Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954).

Accardi alleged the BIA had unconstitutionally "prejudged" and denied his application for suspension of deportation. *Id.* at 262. The Attorney General had prepared a confidential list of "unsavory characters" he wished deported, and circulated the list widely to all INS and BIA employees. Accardi's name was on that list. *Id.* This Court was troubled by the fact that the BIA responded to a strong suggestion (if not a mandate) from the Attorney General, instead of exercising its own discretion as to whether Accardi should be deported. *Id.* at 267-68. *See also Lindsey v. State of Washington*, 301 U.S. 397 (1937) (retroactively applying a criminal sentencing statute to "make mandatory what was before only the maximum sentence" also violated due process).

In short, the right to a §212(c) hearing is a "matter of obvious great moment" to a LPR facing removal and separation from his family, work, and home. By eliminating

the right even to *try* to obtain relief from removal, and making removal automatic, the Fifth Circuit's immigration jurisprudence conflicts with *Accardi* and *Lindsey*.

b. Specific Eligibility Criteria Govern §212(c) Hearings

The Attorney General has discretion (which he properly delegated) to waive removal orders. 8 U.S.C. §1182(c) (1994); *I.N.S v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). Regardless of whether Congress expressly circumscribes the Attorney General's discretion, if the BIA "announces and follows – by rule or by settled course of adjudication – a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.'" *Yueh-Shaio Yang*, 519 U.S. at 29.

Here, policies governing the BIA's exercise of discretion do exist. Nearly thirty years ago, the BIA established criteria, comparable to common-law rules, that an IJ *must* consider when reviewing §212(c) applications. *Marin*, 16 I. & N. at 584-85. Beyond *Marin*, the BIA has further limited IJ discretion. Thus, if the LPR's crime is serious and "the negative [*Marin*] factors grow more serious," the positive factors must be stronger, usually requiring "outstanding equities." *Edwards*, 20 I. & N. Dec. at 195. If these "outstanding equities" exist, then rehabilitation becomes an important factor in the ultimate discretionary balancing the IJ undertakes. *Id.; see In re Buscemi*, 19 I. & N. Dec. 628, 633 (BIA 1988); *In re Roberts*, 20 I. & N. Dec. 294 (BIA 1991).

These factors limit BIA discretion at least as much as the statutory limits on prison officials' discretion to deprive a prisoner of "good time" credits at issue in *Wolff v. McDonnell*, 418 U.S. 539, 545-53 (1974), where this Court

found prisoners had a liberty interest in the determination of whether such credits could be taken away.

Petitioner had a legitimate expectation of obtaining relief from removal if given the opportunity to have a hearing. In the Clinic's experience, IJs, through "settled course of adjudication" [*Yueh-Shaio Yang*, 519 U.S. at 29], often grant §212(c) relief where a LPR establishes rehabilitation - one of *Marin*'s most important factors. Where no subsequent crime bars §212(c) relief, then the LPR has both qualified for discretionary relief *and* shown he has been rehabilitated and remained trouble-free. *Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 497-98 (5th Cir. 1992). Most IJs with whom the Clinic has worked find rehabilitation a sufficiently strong factor as to usually grant discretionary relief. This standard applies to sex offenders too--if the crime is serious (which, admittedly, it is here) then "unusual or outstanding equities" are required. *See Edwards*, 20 I. & N. Dec. 191. But, "unusual or outstanding equities" is not hard to show. *Id.*; *Buscemi*, 19 I. & N. Dec. at 633.

It also is the Clinic's experience that §212(c) relief was particularly likely to be granted where, as here, a low-level sex offense was the crime at issue. *United States v. Copeland*, 369 F.Supp.2d 275, 289-90 (E.D.N.Y. 2005) (alien facing removal proceedings because of two or more narcotics convictions, or because of a violent crime, might be required to demonstrate "unusual or outstanding countervailing equities to obtain a waiver of deportation").

In fact, largely because of the recognition that IJs regularly granted exemption from removal in a substantial percentage of cases, some circuits recognize that a failure to inform a LPR who is subject to removal of the availability of §212(c) relief can render a removal proceeding fundamentally unfair. *E.g., United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 (9th Cir. 2003) (underlying

removal order rendered fundamentally unfair by the IJ's failure to advise alien of his right to seek §212(c) relief; reversing the petitioner's convictions under 8 U.S.C. §1326); *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004) (failure to advise alien of right to seek §212(c) relief rendered the removal proceeding fundamentally unfair).[3]

D. The Retroactive Elimination of Some Aliens' (But Not Others') Rights To Seek §212(c) Relief Improperly Differentiates Between Similarly Situated Lawful Permanent Residents

This Court also should grant the Petition for the independently compelling reason that the disarray in the federal courts of appeals over when and whether the repeal of INA §212(c) can be applied retroactively has resulted in highly non-uniform immigration laws.

By discriminating between LPRs who pleaded guilty to a crime (who are entitled to seek §212(c) relief), and LPRs who were found guilty by a jury (who are *not* entitled to seek §212(c) relief), the Fifth Circuit makes an arbitrary and capricious distinction that bears no rational relation to the immigration laws' purpose. No reasonable basis exists upon which to believe, for example, that an alien who was found guilty of a crime after trial is more "undesirable" as a U.S. resident than an alien who pleaded guilty to the same crime. *Cf. Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (striking down the BIA's practice of distinguishing between aliens who had left the country and those who had never left

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[3] Again, however, the Fifth Circuit has taken a contrary view. *Lopez-Ortiz*, 313 F.3d 225 ; *Alfarache v. Cravener*, 203 F.3d 381, 383-84 (5th Cir. 2000). This view, however, wrongly equates an entitlement to receive a favorable decision in a § 212(c) hearing with the right to have such a hearing.